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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN KACHUCK, Defendant and Appellant.	A155834 (Sonoma County Super. Ct. No. SCR716105)

On July 16, 2018, the Sonoma County District Attorney filed an information charging appellant Stephen Kachuck with driving and stealing a vehicle (Veh. Code, § 10851, subd. (a).) It was also alleged that appellant had previously suffered a conviction for auto theft, and had five prison priors. (Pen Code, §§ 496d, subd. (a); 666.5, subd. (a); 667.5.)[1] Appellant pled no contest to the charge and admitted having been previously been convicted of auto theft and having suffered one prior prison term.

On November 1, 2018, the trial court denied probation and sentenced appellant to an aggregate term of four years to be served as follows: two years in county jail and two years suspended and under mandatory probation.[2] (§ 1170, subd. (h).)

[1] All subsequent statutory references are to the Penal Code.

[2] Under section 1170, subdivision (h)(5)(B), a defendant subject to "mandatory probation" must "be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." Although mandatory supervision is akin to probation (*People v. Griffis* (2013) 212 Cal.App.4th 956, 963, fn. 2), it is in some respects "more similar to parole than probation." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423.) Accordingly,

At the November 1, 2018 sentencing hearing, the court ordered the following conditions of mandatory supervision: "You shall submit to warrantless search and seizure of your person, property, personal business, or vehicle at any time of the day or night and of your residence at any time of day or reasonable hour of night by any law enforcement officer or probation officer. You shall not possess any weapons."

After dismissing other counts,[3] the trial court advised appellant that because he had been convicted of a felony he was required to provide blood and saliva samples, could not enter any county penal institution without consent of the sheriff, and "[y]ou may not own, or have in your possession, or under your custody or control any firearm or ammunition pursuant to federal and state law."[4] The court also noted that appellant had filled out and submitted a "firearm relinquishment form," and found that "there are no reportable firearms based on the report returned to the court."

Appellant's sole claim on this appeal is that the condition that he "shall not possess any weapons" is invalid under the void-for-vagueness principle.[5] Appellant did not object to this provision in the trial court but, as the Attorney General acknowledges, his failure to object does not forfeit the claim in this court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887–889.)

We shall affirm the judgment.

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mandatory supervision conditions have been analyzed "under standards analogous to the conditions or parallel to those applied to terms of parole." (*People v. Martinez* (2014) 226 Cal.App.4th 759, 763.) However, the standard for evaluating the validity of parole conditions is "the same standard as that developed for probation conditions." (*Id.* at p. 764.)

[3] Unsure whether there were multiple counts, the court asked the prosecutor how many the complaint contained. Although it contained only one count, the prosecutor erroneously informed the court that there were "other counts in the complaint."

[4] The quoted statement, and other advisements given appellant at the close of the sentencing hearing, are identical to the "Advisement per 1203.1 PC" set forth on the last page of the presentence report.

[5] This statement is somewhat different from the pertinent condition of pretrial release recommended by the probation officer in the presentence report, which is: "Do not own, possess, or use any firearms, weapons, or ammunition."

FACTS

Rohnert Park Public Safety Officer Daniel Hargraves testified at the preliminary hearing that around 6:30 p.m. on November 23, 2018, while stopped at a traffic light on an intersection, he saw appellant driving a Honda Civic on the cross street at a high rate of speed. As he turned onto the street behind appellant trying to make a traffic stop, appellant pulled into a parking lot. As he approached appellant's vehicle, it pulled out of the lot using another driveway. While trying to catch up with appellant, who was travelling in excess of the posted speed limit, Officer Hargraves lost sight of his vehicle for between 5 and 10 minutes. He then observed the unoccupied Honda parked in a handicap space in a motel parking lot. As he approached the Honda, the officer's patrol vehicle's license plate reader system "hit" on the car, indicating it had been stolen. When he searched the vehicle Officer Hargraves found photocopies of appellant's California identification card and social security card, as well as other indicia appellant owned or had been using the vehicle.

DISCUSSION

Applicable Law

" 'The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.] The primary goal of probation is to ensure "[t]he safety of the public . . . through the enforcement of court-ordered conditions of probation." [Citation.]' [Citation.] Accordingly, the Legislature has empowered the court, in making a probation determination, to impose 'any reasonable conditions, as it may determine are fitting and proper to the end that justice may be done. . . . [Citation.] Although the trial court's discretion is broad in this regard . . . a condition of probation must serve a purpose specified in Penal Code section 1203.1.' " (*People v. Olgui*n (2008) 45 Cal.4th 375, 379 (*Olguin*).) Appellant did not in the trial court contend that the condition he now challenges on the ground of vagueness also fails to serve any of the purposes specified in section 1203.1 or that the condition fails to meet the test posited in *People v. Lent* (1975) 15 Cal.3d 481.

Generally, a probation condition that places a limitation on noncriminal conduct will be upheld if it is reasonably related to either the crime of which the defendant was convicted or preventing future criminality. (*Olguin*, *supra*, 45 Cal.4th at pp. 379–380.) The sole claim appellant advances is that the condition at issue is unconstitutionally vague.

Analysis

As the parties' briefs focus on language in the recent opinion in *People v. Hall* (2017) 2 Cal.5th 494 (*Hall*), we commence our discussion with an analysis of that opinion.

Hall was convicted of possessing cocaine base for sale and placed on probation, one of the conditions of which provided that he " 'may not own, possess or have in [his] custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on [his] person.' " (*Hall*, *supra*, 2 Cal.5th at p. 498.) Hall challenged the condition as unconstitutionally vague on the ground it failed to spell out the mens rea necessary to sustain a violation of the condition, by barring "knowing" possession of firearms. The Court of Appeal rejected this claim, concluding that firearms conditions did not need to explicitly bar "knowing" possession " 'because the mens rea generally applicable to probation conditions precludes the finding of unwitting violations.' " (*Ibid*.) In affirming the judgment in *Hall*, the Supreme Court employed much the same reasoning.

Appellant finds *Hall* distinguishable from this case because the condition in that case—which proscribed possession of "any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on [his] person"—defined with certainty the kind of "weapon" the probationer must not possess; whereas the condition in this case leaves the "weapon" that must not be possessed wholly undefined. As appellant says, "[c]arrying a pocket knife in the woods to harvest mushrooms might be a violation. Having an exposed and sheathed legal hunting knife on his belt could lead to trouble for him. Indeed, he might be sitting in a park carving an apple to eat with a pen knife and be penalized." In appellant's view, the condition at issue merely tells him he must not

"possess any weapon" without informing him whether the prohibited "weapon" must be an object commonly considered a weapon, or merely could reasonably be seen as such, depending on circumstances that cannot all be anticipated.

Appellant argues, in other words, that the condition cannot be saved by the rule that in interpreting probation conditions courts must rely on "context and common sense" (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 677) and give the condition " 'the meaning that would appear to a reasonable, objective reader.' " (*Olguin, supra,* 45 Cal.App.4th at p. 382.) He emphasizes that a new statute or supervisory condition may invite arbitrary and discriminatory enforcement not due to any vagueness in the statutory or limiting condition "but due to the wide range of otherwise innocent conduct it proscribes." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333.)

Focusing on language in *Hall* appellant ignores, the Attorney General sees the matter differently, and we find his analysis of the law more persuasive.

Fully accepting the proposition that "a probation condition must be sufficiently definite to inform the probationer what conduct is required or prohibited, and to enable the court to determine whether the probationer has violated the condition" (*People v. Hall, supra*, 2 Cal.5th at p. 500), the Attorney General emphasizes that, as stated in *Hall*, a challenged condition must be considered in context and "should not be invalidated as unconstitutionally vague ' " 'if any reasonable and practical construction can be given to its language.' " ' " (*Id.* at p. 501.) *Hall* found that despite the absence in the challenged condition of an *explicit* scienter requirement, the condition contained an *implicit* knowledge requirement. "Just as most criminal statutes—in all their variety—are generally presumed to include some form of mens rea despite their failure to articulate it expressly, so too are probation conditions generally presumed to require some form of willfulness, unless excluded ' " 'expressly or by necessary implication.' " ' " (*Hall*, at p. 502.) Thus, despite absence of the word "knowing" or other explicit scienter requirement in the weapons condition in *Hall*, the court found it properly construed "as prohibiting defendant from *knowingly* owning, possessing, or having [the prohibited weapon] in his custody or control." (*Id*. at p. 503.)

With respect to appellant's effort to distinguish the condition in *Hall* from that in this case because the condition at issue in *Hall* defined the kind of "weapon" the probationer must not possess with far greater specificity than that here, the Attorney General urges us to consider and adopt the reasoning in *People v. Forrest* (2015) 237 Cal.App.4th 1074 (*Forrest*), which we agree is instructive.

The condition in *Forrest* stated that the probationer may not own, "transport, sell, or possess any weapon, firearm, *replica* firearm or weapon, ammunition, or *any instrument used as a weapon*." Forrest argued that different dictionaries defined "replica" differently (one defined it as an "exact copy or reproduction, especially on a smaller scale" and the other "an exact or very close copy of something"), and that the phrase "any instrument used as a weapon" are unconstitutionally vague. The Court of Appeal found these arguments unavailing.

In response to Forrest's first point, the court observed that "in context, the word is reasonably specific. [Citation.] The purpose of [the condition] is to protect the public from violence or threats of violence and to prevent future criminality. To effectuate this purpose, Forrest is on fair notice she is prohibited from using or possessing actual firearms or weapons and she is also prohibited from confronting others with devices those individuals could reasonably perceive to be a weapon or firearm. The word 'replica firearm or weapon' adequately conveys this prohibition." (*Forrest, supra*, 237 Cal.App.4th at p. 1081.)

Forrest's second contention was that the word "used" in the phrase "any instrument used as a weapon" rendered the condition unconstitutionally vague "because it is unclear whether the phrase prohibits (1) the possession of any instrument where she intends to use the instrument as a weapon or (2) the possession of any instrument which is sometimes capable of being used as a weapon." (*Forrest, supra*, 237 Cal.App.4th at p. 1082.) The court felt it unnecessary to modify the condition because, "again, this condition is clearly directed at prohibiting weapon possession and, when it is read in context, reasonable persons would understand that 'any instrument used as a weapon' refers to an item that is being used, or is intended to be used, as a weapon, and does not

refer to any object that might conceivably be used as a weapon. The phrase 'used as a weapon' on its face excludes objects that are merely capable of being used as a weapon but are not actually being used as such. Also, because a violation of [the condition] requires Forrest to have had knowledge that the object instrument is used as a weapon, she will not be subjected to a probation violation unless she knows the instrument she possesses is intended for use as a weapon. For example, a probationer convicted of a violent crime would not be in violation of [the condition] by carrying a bat to baseball practice, but would be in violation of that condition if he or she possessed a baseball bat in the context [of] being a member of a gang on the way to a gang-related confrontation." (*Forrest*, at p. 1082.)

By parallel reasoning, the Attorney General argues it is inconceivable that a probationer would be deemed in violation of the challenged condition for using a pocket knife to harvest mushrooms or cut an apple. A violation could be found, the Attorney General says, only upon a showing that the probationer intended to use the pocket knife (or any other commonplace instrument) as a weapon to cause or threaten physical harm. The argument is persuasive. As in *Forrest*, the purpose of the challenged condition is to protect the public from violence or threats of violence and to prevent future criminality. Considered in context, the concise statement that "you shall not possess any weapons," effectuates that purpose by providing appellant fair notice he is prohibited from knowingly possessing any type of weapon—that is, to borrow the primary definition of "weapon" set forth in the Oxford English Dictionary, "an instrument of any kind used in warfare or in combat to overcome an enemy."

Such a construction of the simple language of the condition is both reasonable and practical.

Since "a probation condition should not be invalidated as unconstitutionally vague ' " ' if any reasonable and practical construction can be given the language' " ' " (*Hall, supra,* 2 Cal.5th at p. 501), we reject appellant's vagueness claim.

DISPOSITION

Accordingly, the judgment of the superior court is affirmed.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

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